Supreme Court, U. S.
FILED
APR 24 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

No. 77-1524

PHILLIP DOUGLAS MILLER, ESQ.,
PETITIONER,

V.

THE AMERICAN TELEPHONE & TELEGRAPH CO. ("AT&T"), ET AL,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR
THE SECOND CIRCUIT

PHILLIP DOUGLAS MILLER, ESQ.
434 EAST 52ND STREET,
SUITE 1A,
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ATTORNEY & PLAINTIFF PRO SE

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SUPREME COURT OF THE UNITED STATES

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Petitioner, an attorney licensed to practice in the State of New York, before the United States District Court for the Southern District, before the United States Court of Appeals

for the Second Circuit, and before this Court, respectfully asks that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered on January 23, 1978.

OPINION BELOW

The opinion of the U.S. Court of Appeals, Second Circuit, has not been reported. Nor has the decision of the U.S. District Court, Southern District. Both opinions appear in the Appendix hereto.

JURISDICTION

Jurisdiction over this Petition is sought pursuant to 28 U.S.C. 1254(1), and U.S. Sup. Ct. Rule 19(1)(b).

QUESTIONS PRESENTED FOR REVIEW

1. Did the U.S. Court of Appeals, Second Circuit, abuse its discretion in dismissing Plaintiff's appeal of the claims dismissed by the U.S. District Court, on the basis that the appeal was not from a final judgment under 28 U.S.C. 1291, despite the authority of Sears, Roebuck & Co. v. Mackey 351 U.S. 427(1957); Gillespie v. U.S. Steel Co. 379 U.S. 148(1964); and O'Donnell v. Latham 525 F2d 650 (5th Cir.,1976).

2. Did the U.S. Court of Appeals, Second Circuit, abuse its discretion in not reversing the decision of the U.S. District Court to dismiss those constitutional and statutory claims, the dismissal of which were appealed, on the basis that the District Court failed to accept the allegations contained in the Complaint as true, for purposes of a motion to dismiss. Sears, Roebuck & Co., supra.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution:
   a) First Amendment: prohibiting abridgement of freedom of speech.
   b) Fifth Amendment: prohibition against deprivation of property without due process of law.
   c) Thirteenth Amendment: authorizing congressional legislation to prohibit slavery and involuntary servitude.
   d) Fourteenth Amendment: prohibition against deprivation of property without due process of law, and against denial of equal protection of the laws.

2. Executive Order No. 11,246. Section 202(1): prohibiting discrimination in all government contracts regarding employment, transfer, termination, and rates of pay.

3. 42 U.S.C. 2000e-2(a)(1) and(2): prohibiting, as an unlawful employment practice, the discharge, or otherwise discriminating against an individual, with respect to the following, because of race, color, or national origin:
   a) compensation
   b) terms, conditions, or privileges of employment
   c) segregation, or classification of employees in any way which would deprive such person of employment opportunities, or otherwise adversely affect the status of the employee.

4. 42 U.S.C. 2000e-3(a): prohibiting, as an unlawful employment practice, discriminating against an employee because he has opposed an unlawful employment practice.

5. 42 U.S.C 1981: granting all persons in the jurisdiction of the United States the same

right to contract, to sue, and to the full and equal benefit of the laws, as is enjoyed by white citizens.

5. 42 U.S.C. 1982: granting all U.S. citizens the same right to lease and hold real and personal property, as is enjoyed by white citizens.

6. 42 U.S.C. 1985(2) & (3): prohibiting any conspiracy to injure any person or his property for seeking enforcement of his/her right to equal protection under the laws.

7. New York Executive Law, Sections 292.1; 296.1; and, 297.9:
   a) Section 292.1: defining a corporation as a "person."
   b) Section 296.1(a): prohibiting an employer from engaging in the following acts:
      1) discharge an employee because of race, color, or national origin.
      2) discriminate against an individual because of race, color, or national origin, incompensation, or terms, conditions, or privileges of employment.
   c) Section 297.9: authorizing a civil action in any court of competent jurisdiction to enforce the provisions of this law.

STATEMENT OF THE CASE

The merits of this case are as follows. I am black, male, and an attorney licensed to practice in the State of New York. In January, 1976, I accepted an offer of employment from AT&T, as a tax attorney in the Comptroller's Dept., after leaving the law firm of Dewey, Ballantine, Bushby, Palmer & Wood, Esqs. When I began working at AT&T it became clear that there was no such position of tax attorney. Additionally,

I never received the specific areas of responsibility promised me as a condition for taking the job; the salary agreement was less, and certain important employee benefits promised were not available to me. For four months I did my work despite this painful reality. Then, AT&T hired a white, female attorney and assigned her, in writing, the same responsibilities I had agreed to undertake as a condition for taking the job. At that point, I complained for the first time. Immediately thereafter, I was taken off assignments, given menial tasks, criticized for my work (although I had never previously been criticized for my work), and harassed. I responded by following the procedure for complaining of discriminatory treatment set out in AT&T's Affirmative Action Plan ("AAP"). I requested a transfer to the Tax Legal Dept. I was informed that I could apply for a transfer but there were no openings. When attempts at a resolution appeared finished,with no result that would rectify the existing discrimination--much less protect me from further discrimination-- I requested a leave of absence with pay. At the time this request was made, in the past 8 months I had taken no more than 3 days vacation,out of 3 weeks vacation to which I was entitled. On my third day away from the job, I was told I was fired-- in direct and blatant violation of AT&T's AAP, established by federal court order.

I was fired approximately 8 months after I was hired, and approximately 3 weeks before AT&T was absolutely obligated to evaluate me under the AAP. From my initial complaint approximately 4 months before I was fired, I had requested evaluation as required by the AAP. AT&T refused to evaluate me throughout the entire time, and ended up firing me in violation of the clear terms of the AAP, and the company's own employee rules.

Setting aside the legal technicalities, the basic issue is this: will the Supreme Court take this opportunity to give notice to AT&T, this country's largest employer, that in its actions to comply with the discrimination laws it can not simply hire blacks to satisfy government imposed quotas, but it must also treat them in the job in a non-discriminatory manner? I sued for one reason: AT&T only hired me to fill a federally imposed minority quota, and it had no intention of giving me the career opportunity they themselves had promised me in the course of offering me the job. At this point in history, the discrimination laws require enforcement not only to obtain jobs for minorities, but also to provide protection against discriminatory mistreatment on the job, and discriminatory dismissal.

Jurisdiction by the federal courts over this case, in the first instance, was predicated upon 28 U.S.C. 1331 & 1343.

AMPLIFICATION OF REASONS FOR ALLOWANCE OF THE WRIT

It is submitted that the United States Court of Appeals for the Second Circuit has rendered a decision affirming the District Court in this case which should be reviewed by the United States Supreme Court for the following reasons:

1. The Second Circuit has decided federal questions in conflict with applicable decisions of the Supreme Court. Specifically, in Sears, Roebuck & Co. v. Mackey 351 U.S. 427(1957), the Supreme Court ruled, in an appeal from an order striking two of four claims, that FRCP 54 is superseded by 28 U.S.C. 1291, and FRCP 54 is applicable only where there is no final decision under 28 U.S.C. 1291. 351 U.S., at pp.437-8.

In Petitioner's case, all the claims against all the individual Defendants were dismissed. Additionally such dismissal was based solely on the pleadings. In Gillespie v. U.S. Steel 379 U.S. 148(1964), the Court , in stating factors which would support Petitioner's position that the determination of the District Judge was a final decision, also stated that "in this day of liberality in allowing amendment of pleadings to achieve the ends of justice," mere pleading should not have been the basis for dismissal of the claim.

2. The Second Circuit has rendered a decision in conflict with a decision of the Fifth Circuit on the same question. In O'Donnell v. Latham 525 F2d 650 (5th Cir., 1976), the Court of Appeals for the Fifth Circuit held that it had jurisdiction to hear the appeal of an Order dismissing the action in its entirety against one of the Defendants. The Court held the order apppealable since it settled the issue of liability of one party to the action as against all the other parties. The Court ruled that, although there was no certification under FRCP 54, this rule does not supersede statutes controlling appellate jurisdiction.

3. By ruling as it did, the Second Circuit has too far departed from the accepted and usual course of judicial proceedings. It has sanctioned such a departure by the District Court, which is additional and further basis to justify an exercise of this Court's power of supervision. The documentary evidence referred to and the facts alleged were not deemed true for purposes of the Respondents motion to dismiss. This principle is too well established for the Second Circuit to reject application of this principle in this case. Additionally, the decision of the Second

Circuit contradicted the clear holding in Sears,Roebuck,supra, in holding the dismissal of the entire Complaint against the individual Defendants was not a final decision under 28 U.S.C. 1291. Under the holding in that case, the Court also made clear that judicial economy and convenience were central factors to consider in determining whether a decision was final. This case is being appealed at this stage because it is unjust and unfair to have this case go to trial on some claims, and after one trial, proceed to trial again on another set of claims, especially when all the legal claims alleged arise out of the same set of facts.

Respectfully Submitted.

Date: April 24, 1978

Phillip Douglas Miller,Esq.
434 East 52nd Street,
New York, N.Y. 10022

Attorney & Plaintiff Pro Se

APPENDIX*

*Containing the decisions of the District Court, Court of Appeals(Second Circuit), and the Notice of Appeal.

(11)

U.S. DISTRICT COURT
FILED
DEC 4 1977
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHILIP DOUGLAS MILLER, ESQ.,

Plaintiff,

-against-

THE AMERICAN TELEPHONE & TELEGRAPH COMPANY ("AT&T"), JOHN deBUTTS, ROBERT FLINT, DONALD LAMONT, CYRUS HALPERN, RODERICK AYA, MESSRS. CHRISTENSON, ANDERSON, WORTHY, GAMMON AND CERTAIN OTHER UNNAMED EMPLOYEES OF AT&T,

Defendants.

76 Civ. 5462 (KTD)

MEMORANDUM AND ORDER

APPEARANCES:

PHILIP DOUGLAS MILLER, ESQ., Plaintiff
Pro Se

JAMES A. DeBOIS, ESQ.
CLARENCE M. DUNNAVILLE, ESQ.
SAUL SCHEIER, ESQ.
Attorneys for Defendants

MICROFILM
FEB 1 ...

KEVIN THOMAS DUFFY, D. J.

Plaintiff, a black lawyer and former employee of American Telephone and Telegraph Company (AT&T), has brought this pro se action against AT&T and various named and unnamed AT&T employees alleging, inter alia, in approximately 24 separate causes of action, racial discrimination in hiring, terms and conditions of

employment, classification and status, retaliation and discharge, as well as a slew of "common law" claims, including fraud, deceit, misrepresentation, breach of contract, mental distress, conversion and trespass.

The gist of plaintiff's complaint follows. On January 12, 1976 he began to work for AT&T. It was his understanding that he would be working in the Comptroller's Department as a tax attorney, responsible for matters dealing with investment credit, depreciation and cost accounting, and that he was to be groomed for the position of Manager, Tax Research and Planning, when, in two or three years, the present manager would be retiring. He also understood that he would be entitled to certain annual salary increments and other more immediate fringe benefits. It is claimed, however, that he performed the duties of an accountant, and not an attorney; he was given no responsibility in any of the allegedly promised areas; he found that the manager was not due to retire for 5 1/2 years; and the benefits and raises were not immediately forthcoming. Plaintiff contends that he was induced to take the job at AT&T merely to satisfy AT&T's minority quota, and that a subsequently hired white female attorney was given the position and responsibility promised him.

Plaintiff further asserts that his treatment during his employ had discriminatory underpinnings ostensibly resulting from complaints made by him about his job. As a result of a statement submitted by plaintiff to his superiors on July 1, 1976, it was suggested that he transfer to the Tax Legal Department, accept another position within the Comptroller's Department or voluntarily leave the company. Plaintiff, however, refused these options because "it was [AT&T's] duty to take some affirmative step to rectify the wrong" (Complaint ¶d(1)); he then indicated to AT&T that he would begin legal proceedings "if the matter could not be resolved in a way [he] considered fair." (Id).

On September 9, 1976, two days after plaintiff had requested an absence without pay "for personal reasons," he was fired because of his "attitude and performance," and was given three weeks to find another job. Plaintiff claims that his performance record was a good one, and that his discharge represented the last in a continuing series of discriminatory acts. Unable to find a satisfactory position, plaintiff embarked on the private practice of law.

On January 11, 1977, four months after his termination by AT&T, and one month after commencing

this action, plaintiff moved by order to show cause for a preliminary injunction seeking back pay and compelling his reinstatement, not to his former position at AT&T, but to be transferred to AT&T's Legal Department. He alternatively seeks to require AT&T to enter into a retainer agreement for his legal services at a rate equal to his former compensation - $28,000 - plus benefits.

Defendants have cross moved to dismiss the action on two grounds: for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), F.R.Civ.P.; and for lack of in personam jurisdiction over the individual defendants pursuant to Rule 12(b)(2), F.R.Civ.P. Alternatively, they move to strike portions of the complaint as immaterial and impertinent pursuant to Rule 12(f), F.R.Civ.P.

PRELIMINARY INJUNCTION

Plaintiff essentially reasons that since private practice is not financially viable and he will, therefore, not be in a position to prosecute the suit if he has to wait for trial, he is entitled to speed the resolution of his claims through the medium of mandatory preliminary injunctive relief. I disagree.

The purpose of a preliminary injunction is to maintain and preserve the status quo until such time as

the case can be ultimately resolved on the merits. SCM Corp. v. Xerox Corp. 507 F.2d 358, 361 (2d Cir. 1974); Unicon Management Corp. v. Koppers Company, 366 F.2d 199, 204 (2d Cir. 1966); 7 Moore's Federal Practice ¶65.04[1] (2d ed. 1975). The relief plaintiff seeks, however, will not preserve the status quo since plaintiff has never occupied either of the requested statutes. In fact, no employment or other relationship between the parties existed at all at the time this suit was brought since plaintiff had been discharged three months prior thereto.

Moreover, where the granting of an injunction would substantially give plaintiff the ultimate relief requested, a clear right to such relief must be shown. Blaich v. National Football League, 212 F.Supp. 319, 320 (S.D.N.Y. 1962). Such a clear right has not been shown either by plaintiff's conclusory allegations in his affidavit, or by his oral presentation on the return date of the motion or did plaintiff seek to introduce evidence on the issue at that time. Additionally, plaintiff's claimed need for immediate relief is undercut by the delay with which plaintiff has sought to obtain it. Although this delay may be explained by plaintiff's inability to discern at an earlier date that he could not make a satisfactory living in private practice - and his present adverse financial situation is not to be taken

lightly - it is clear that whatever ill effects resulted from the alleged acts of discrimination were concretely felt months prior to this time, when plaintiff unsuccessfully sought a position with another company.

LACK OF IN PERSONAM JURISDICTION

Defendants assert that personal jurisdiction over the individually named defendants is lacking as a result of defective service. On December 14, 1976 several copies of the summons and complaint were served on AT&T in conformity with an order filed December 8, 1976 and signed by the Clerk of this Court, pursuant to Rule 12(a) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York, ostensibly appointing a person other tnan the U.S. marshall to serve process. The order, however, went beyond the mere appointment of a process server; in effect, it appointed AT&T as an agent for the service of process on the individual defendants, and, in authorizing expedient "last resort" service in this manner, See N.Y.C.P.L.R. ¶308(5), it is of no force and effect. None of the individual defendants have authorized AT&T to accept service on their respective behalf; therefore, none of the individual defendants have been personally served in a manner which

statutorily comports with due process dictates. Rules 4(d)(1)(7), F.R.Civ.P.; N.Y.C.P.L.R. ¶308. The action is thus dismissed as against the individual defendants. The motion to dismiss the complaint for failure to state a claim will be considered only as to the remaining defendant, AT&T.

FAILURE TO STATE A CLAIM

Plaintiff asserts, in shotgun fashion*, claims for violation of his rights under 42 U.S.C. §§1981, 1982, 1985(c), 2000(d) and (e), Executive Order No. 11246, 41 C.F.R. §1.12.803-1, as well as the First, Fifth, Ninth, Tenth, Thirteenth and Fourteenth Amendments to the United States Constitution. He additionally asserts, under pendent jurisdiction, claims of fraud, deceit, misrepresentation, breach of contract, mental distress, conversion of personal property, trespass, defamation, and violations of both the New York Executive Law §§292.1, 296.1, 297.9 and the New York City Administrative Code §§B1-7.0, 343-8.0..

The claim based on constitutional

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* Plaintiff has numerous times reminded this Court of his illustrious legal qualifications. I am not unmindful, however, of the liberality with which pro se complaints must be construed, Haines v. Kerner, 404 U.S. 519 (1972), and I hesitate to depart from that principle in this case.

amendment violations are dismissed. Plaintiff has failed to assert either the requisite governmental or state action required for the applicability of the First, Fifth, and Fourteenth Amendments; or facts establishing involuntary servitude under the Thirteenth. Both the Ninth and Tenth Amendments are inapplicable in this context.

The Title VI claim, 42 U.S.C. ¶2000(d) et seq. is likewise dismissed since Title VI is aimed at discrimination in federally funded programs, clearly not in issue in this case. Nor is 42 U.S.C. §1982, prohibiting racial discrimination in the sale or rental of property, applicable here. 41 C.F.R. 1-12.8 et seq. sets forth the procedures for carrying out the requirements of Executive Order No. 11246 which deals with equal employment opportunities in government contracts and federally assisted construction contracts; pursuant thereto, 41 C.F.R. §1.12.803-1 provides for the inclusion of an equal opportunity clause in such contracts. Neither authority is relevant in light of the issues raised in the complaint. Thus, these claims are also dismissed.

At first blush, 42 U.S.C. §1985(3) appears applicable. That section reaches certain private conspiracies to deprive persons of their legal rights.

A legally sufficient §1985(3) claim must aver a conspiracy between two or more persons to deprive another of the equal protection of the law, or of equal privileges and immunities under the law, as well as an act in furtherance of the conspiracy which causes injury or deprivation of rights. Girard v. 94th Street and Fifth Avenue Corp., 530 F.2d 66 (2d Cir. 1976). However, regardless of the amount of persons allegedly involved, the conspiracy requirement is not met if the acts complained of represent the implementation of a single policy of a single policymaking body, as opposed to the convergence of multiple and separate determinations. Id. It is apparently plaintiff's position that the individual and corporate defendants conspired to deprive him of his civil rights because of his race; but the complaint is totally devoid of allegations of conspiracy. Even if such assertions could be gleaned from the complaint and accepted as true for the purposes of this motion, it does not appear that the acts alleged were other than the implementation of a single AT&T policy. Indeed, his assertions relating to the manner in which he was hired, treated while an employee, and discharged support the operation of a collective judgment, rather than the requisite series of individual decisions.

As such, the complaint is insufficient to state a §1985(3) claim.

Finally, the Title VII claim, 42 U.S.C. §2000e et seq., otherwise cognizable, is also dismissed. Plaintiff has concededly failed to exhaust the administrative avenue of relief, a prerequisite to suit in the federal courts. See Johnson v. Railway Express Agency, Inc. 421 U.S. 454 (1975).

It appears, however, that plaintiff has managed to state a claim against AT&T based on 42 U.S.C. §1981, a statute designed to reach private acts of discrimination separate and apart from any relief available until Title VII. Johnson v. Railway Express Agency, Inc., supra. Defendants glibly oppose the sufficiency of this claim by suggesting that plaintiff's use of the terms "discrimination" and "retaliation" are devoid of meaning or legal significance, and could not support a finding of discrimination in this case. Whether plaintiff can prove his claim is a matter to be appropriately addressed on a motion for summary judgment or at trial; I cannot concur with defendants' evaluation based merely on the pleadings.

Since this Court has jurisdiction over plaintiff's §1981 claim against AT&T by virtue of 28 U.S.C.

§1343(4), a consideration of the non-federal claims is in order. Defendants cavalierly assert that the state claims must be dismissed for improper use of the pendent jurisdiction doctrine.

Before reaching this issue, the claims based on violations of New York Executive Law §§292.1, 296.1, 297.9 and New York City Administrative Code B1-7.0 must be dismissed. Neither claim is enforceable in federal court since both are part of administrative schemes which are administered by the State Division of Human Rights and the City Commission on Human Rights, respectively, with judicial review in state courts. The claim based on New York City Administrative Code §343-8.0 is also dismissed, as that section deals with discrimination in employment of city contractors and suppliers, inapplicable here.

As to the remaining claims, however, defendants' motion is denied. Pendent jurisdiction exists whenever the state and federal claims "derive from a common nucleus of operative fact" such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). All of plaintiff's remaining state claims appear to arise from the same set of facts which gave rise to his §1981 claim, and as such, fall properly within the scope of

this related basis of jurisdiction. Since defendants have not raised any issue relating to whether these individual state claims are legally sufficient, I will not consider the same sua sponte.

Plaintiff's motion for a preliminary injunction is denied. The action is dismissed as to the individual defendants. The motion to dismiss the complaint is granted except as to the §1981 claim and related state claims against AT&T to the extent stated in this opinion. The motion to strike portions of the complaint is denied, except as to those claims which have been dismissed.

IT IS SO ORDERED.

Kevin Thomas Duffy, U.S.D.J.

Dated: New York, New York
February 3, 1977

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held in the City of New York on the 23rd day of January, 1978.

Present:
Hon. James L. Oakes,
Hon. Thomas J. Meskill,
Circuit Judges
Hon. John R. Bartels,
District Judge.

UNITED STATES COURT OF APPEALS
FILED
JAN 23 1978
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Phillip Douglas Miller,
Appellant,

v.

American Telephone &
Telegraph Co.,
Appellee.

No. 77-7096

O R D E R

Phillip Douglas Miller (appellant) raises two issues on this appeal. First, he challenges the district court's dismissal of his complaint as to the individual defendants and the district court's dismissal of all his substantive claims with the exception of one predicated on 42 U.S.C. § 1981 (and its related common law claims). Second, he objects to the district court's denial of a preliminary injunction for back pay and for reinstatement in a position in American Telephone & Telegraph Company's (AT&T, appellee herein) Legal Department. We hold that Judge Duffy's dismissal of some defendants and of some claims is not appealable and that his denial of the

requested preliminary injunction did not constitute an abuse of discretion.

Rule 54(b) of the Federal Rules of Civil Procedure provides that the dismissal of an action against fewer than all parties or on fewer than all claims does not give rise to a final judgment appealable under 28 U.S.C. § 1291 unless the district court expressly determines "that there is no just reason for delay and ... express[ly] direct[s] the entry of judgment." Fed. R. Civ. P. 54(b). Appellant's reliance on Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956), is misplaced. Rather, that case supports appellee's proposition that this court has no jurisdiction to hear the appeal on the dismissed claims and parties. Sears, Roebuck recognized in part that Rule 54(b) sought to make the "final decision" requirement of § 1291 exercisable in a "practical manner in multiple claims actions." Id. at 438. Thus, Rule 54(b) permits an appeal on dismissed claims but only upon district court certification. It is uncontroverted that Judge Duffy did not certify the appeal on the dismissed claims and parties. Our jurisdiction on this appeal therefore is limited to whether the district judge abused in discretion in denying preliminary injunctive relief. Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1121 (1975), cert. denied, 426 U.S. 911 (1976).

A principal purpose of a preliminary injunction is to preserve the status quo pending a resolution of the case on the merits. SCM Corp. v. Xerox Corp., 507 F.2d 358, 361 (2d Cir. 1974). Judge Duffy has correctly noted that the relief sought by Miller would not preserve the status quo since he seeks, not reinstatement to the position from which he was discharged, but compelled employment in AT&T's Legal Department. In effect, Miller seeks to create a new reality, rather than to preserve the status quo. Indeed, Miller, at this stage in the proceedings, is really asking for his ultimate relief. To obtain it, he must demonstrate a clear right to such relief, Blaich v. National Football League, 212 F. Supp. 319 (S.D.N.Y. 1962), a showing he has not made.

Nor has Miller satisfied the basic requirement for the obtaining of a preliminary injunction. Miller's temporary loss of income, to be recovered if he ultimately prevails, and alleged loss of reputation, also correctable in the event that he prevails upon the merits, do not constitute irreparable harm. See Sampson v. Murray, 415 U.S. 61, 90-92 (1974). Miller has failed to demonstrate that denial of the injunction will cause him irreparable harm, a predicate to temporary relief. Triebwasser & Katz v. AT&T, 535 F.2d 1356, 1359 (2d Cir. 1976); Mulligan, Preliminary Injunction in the Second Circuit, 43 Brooklyn L. Rev. 831, 832 (1977).

Judgment denying preliminary injunction affirmed; appeal from judgment dismissing certain portion of the complaint dismissed as premature.

Circuit Judges.

4/24
Court of Appeals
Rec'd

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Phillip Douglas Miller, Esq.,
Plaintiff

v.

The American Telephone & Telegraph Co. ("AT&T"), Et Al

NOTICE OF APPEAL

DOCKET NO. 77-7096

SIRS:

PLEASE TAKE NOTICE that Plaintiff, by authority of 28 U.S.C 1254(1), and U.S. Sup. Ct. Rule 19(1)(b), appeals to the United States Supreme Court, from the decision of the United States Court of Appeals for the Second Circuit, entered in this action on January 23, 1978, insofar as it:

(1) Affirms the dismissal by the District Court of all the legal claims contained in Plaintiff's Complaint as against all individual party Defendants; and as it

(2) Dismisses the appeal taken from the District Court's dismissal of all the constitutional and statutory claims contained in Plaintiff's Complaint; and as it

(3) Authorizes taxing costs of approximately $1,100.00 to Plaintiff because of the aforesaid dismissals, despite the merits of this appeal.

Dated: April 24, 1978

Respectfully submitted,

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1524

PHILLIP DOUGLAS MILLER, ESQ.,
Petitioner,

vs.

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Petitioner's appeal from an Order of the District Court which (1) dismissed his action against fewer than all the defendants and (2) dismissed less than all the claims in his complaint, was properly dismissed as premature by the Second Circuit Court of Appeals where neither a Judgment nor a Rule 54(b) had been entered by the District Court 4

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CASES CITED:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1524

PHILLIP DOUGLAS MILLER, ESQ.,

Petitioner,

vs.

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions delivered in the courts below have not been as yet officially reported. The Order in the United States Court of Appeals for the Second Circuit was delivered on January 23, 1978 and the Memorandum and Order in the United States District Court for the Southern District of New York was delivered on February 4, 1977.

QUESTION PRESENTED

Does an appeal lie from a District Court's dismissal of an action against fewer than all the defendants named in the complaint and fewer than all the claims contained therein, if the District Court did not release the case for immediate appeal or direct the entry of a final judgment pursuant to Fed. R. Civ. P. 54(b)?

STATUTE INVOLVED

28 U.S.C.A. §1291 Final Decision of District Courts

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

Petitioner, a New York attorney and former employee of the American Telephone and Telegraph Company (hereinafter referred to as AT&T) filed this suit four months after he was fired from AT&T, naming as defendants AT&T and certain named and unnamed AT&T employees. In his Complaint Petitioner alleged charges of racial discrimination in connection with his hiring; terms and conditions of employment; classification and status during employment; retaliation and discharge. The Complaint further alleged that these discriminatory practices were violative of numerous laws including the First, Fifth, Ninth, Tenth, Thirteenth and Fourteenth Amendments to the United States Constitution; 42 U.S.C. §§1981, 1982, 1985(3), 2000(e) and Executive Order 11,246, 41 C.F.R. 31.12.803-1. Petitioner also alleged under the doctrine of pendent jurisdiction claims of fraud, deceit, misrepresentation, breach of contract, mental distress, trespass, defamation and violation of New York Executive Laws §§292.1, 296.1, 297.9 and the New York City Administrative Code §§B1-7.0 and 343.0.

Upon filing the Complaint Petitioner obtained an Order signed by the Clerk of the United States District Court for the Southern District of New York appointing AT&T as agent for the service of process on the individual defendants. No individual defendant had appointed AT&T to accept service on their behalf. On December 12, 1976 several copies of the Summons and Complaint were served on AT&T. No individual defendant was personally served.

Defendants moved to dismiss the Complaint on two grounds: (1) lack of *in personam* jurisdiction over the individual defendants pursuant to Fed. R. Civ. P. 12(b)(2); and (2) failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). In the Memorandum and Order entered on February 4, 1977, the Honorable Kevin Thomas Duffy, United States District Judge, dismissed the Complaint as to the individual defendants for lack of proper service and dismissed all claims against AT&T except the cause of action based upon 42 U.S.C. §1981 and the common law tort claims which were retained by the Court under the doctrine of pendent jurisdiction.

The District Court did not direct that a final judgment be entered and the United States Court of Appeals for the Second Circuit, *inter alia*, dismissed Petitioner's appeal as to the dismissal of the Complaint as to the individual defendants and the dismissal of certain claims because no final decision had been rendered.

REASONS WHY CERTIORARI SHOULD BE DENIED

Petitioner's appeal from an Order of the District Court which (1) dismissed his action against fewer than all the defendants and (2) dismissed less than all the claims in his complaint, was properly dismissed as premature by the Second Circuit Court of Appeals where neither a Judgment nor a *Rule* 54(b) had been entered by the District Court.

It is apparent from the recitals in the Petition that Petitioner's dissatisfaction with the District Court's decision is the only reason for his seeking a Writ of Certiorari. Not one question of law is presented which would provide those "special and important reasons" for this Court to exercise its discretion under *Rule* 19 in favor of granting the writ.[1]

As Petitioner himself puts it, the "basic issue" is whether the Supreme Court will ". . . give notice to AT&T . . . that it must treat . . . (blacks) . . . in a non-discriminatory manner," and "it is unjust and unfair to limit the trial issues to only some . . . claims . . . especially when

1. Rule 19 provides:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's decision, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision."

all the legal claims arose out of the same set of facts" (Petition at 3 and 4). These contentions simply do not raise any issues of any merit or substance warranting this Court's intervention.

In fact, the order of dismissal which led to this appeal is nothing more than a run of the mill determination by a district court disposing of less than all of the claims or parties in an action. Such determinations have uniformly been held to be non-appealable unless compelling special circumstances are demonstrated which would justify a departure from the finality rule of 28 U.S.C. §1291. See *e.g.*, *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 96 S. Ct. 1202 (1976); *Panichella v. Pennsylvania Railroad*, 252 F.2d 452, 455 (3d Cir. 1958), *cert. denied*, 361 U.S. 932, 80 S. Ct. 370 (1960); *Kuly v. White Motor Co.*, 174 F.2d 742 (6th Cir. 1949); *United States v. Peerless Insurance Co.*, 374 F.2d 942 (4th Cir. 1967); *Kadar Corp. v. Milbury*, 549 F.2d 230, 236 (1st Cir. 1977); *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975); *Luria Bros. & Co. v. Rosenfeld*, 244 F.2d 192, 194 (9th Cir. 1957); and *Zangardi v. Tobriner*, 330 F.2d 224 (D.C. Cir. 1963).

As Judge Hastie of the Third Circuit Court of Appeals pointed out in *Panichella v. Pennsylvania Railroad Co.*, Section 1291 is not a mere technicality but is instead "an authoritative application and implementation of a basic and persisting policy against piecemeal appeals." 252 F.2d at 454. While *Rule* 54(b) of the Federal Rules of Civil Procedure permits an exception to this policy, upon proper certification by the District Court,

> ". . . 54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel. The power which this Rule confers upon the trial judge should be used only in the infrequent harsh case." *Id.* at 455.

The Petitioner did not apply to the District Court for a *Rule* 54(b) order in this case and there has been no showing of special circumstances which would have justified the issuance of such an order. Nor was any issue raised in the appeal to the Second Circuit Court of Appeals concerning whether the District Court should have exercised discretion in favor of entering a *Rule* 54(b) order as is clear from the Court's Opinion. Inasmuch as *Rule* 54(b) vests the district courts in the first instance with the responsibility for determining whether an immediate appeal is appropriate, no question is presented to this Court concerning whether an immediate appeal should have been authorized. See *Gumer v. Shearson, Hammill & Co.*, 516 F.2d 283 (2d Cir. 1974).

Petitioner's reliance on *Sears Roebuck and Co. v. Mackey*, 351 U.S. 427 (1956) is, as the Court of Appeals noted, misplaced. That case actually involved an appeal which had been taken pursuant to a Rule 54(b) order entered by the District Court. Similarly, Petitioner's contention that the decision of the Court below conflicts with the Fifth Circuit decision in *O'Donnell v. Latham*, 525 F.2d 650 (5th Cir. 1976), is without merit because the appellate jurisdiction in that case arose under 28 U.S.C.A. 1292(a)(3), which expressly permits interlocutory appeals in admiralty cases.

Finally, Petitioner asserts that the District Court did not accept as true the allegations contained in his Complaint. Even if this were true—and the District Court's opinion itself belies this contention—that would not make the District Court's non-final order appealable for the reasons stated above.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

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